

# **Exhibit A**

Excerpts of Transcript of September 11, 2017,  
*Omega v. 375 Canal*, 12 Civ. 6979 (S.D.N.Y.)

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

OMEGA SA and SWATCH SA,

Plaintiffs,

v.

12 Civ. 6979 (PAC)

375 CANAL, LLC; JOHN DOES 1 -  
50; and XYZ COMPANIES 1 - 50,

Oral Argument

Defendants.

New York, N.Y.  
September 11, 2017  
2:05 p.m.

Before:

HON. PAUL A. CROTTY,

District Judge

APPEARANCES

COLLEN IP

Attorneys for Plaintiffs

BY: JOSHUA P. PAUL

JESS M. COLLEN

MICHAEL NESHEIWAT

JEFFREY LINDENBAUM

DENTONS US LLP

Attorneys for Defendants

BY: AVI SCHICK

KIRAN PATEL

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1 (Case called)

2 THE COURT: All right. I want to give the parties an  
3 opportunity to argue whatever matters they want to raise with  
4 regard to Mr. Schick's letter of August 4 and Mr. Paul's letter  
5 of -- excuse me, of September 4, Mr. Paul's letter of  
6 September 7, and Mr. Schick's responsive reply of September 8.

7 So, Mr. Schick, anything you want to add?

8 MR. SCHICK: I'll just be very brief, your Honor.  
9 Obviously, there's been extensive correspondence over the last  
10 week. Just to touch very briefly on three points, the first is  
11 materiality. There's no doubt that these declarations were  
12 material. They were relied on by the Court in its summary  
13 judgment decision, which is no surprise because they were cited  
14 repeatedly. Over two dozen times the Cole declaration was  
15 cited by plaintiffs in their papers. And further for the  
16 notion of materiality is, of course, the fact that they were  
17 first solicited after plaintiffs received or first drafted --  
18 after plaintiffs received our summary judgment moving papers.  
19 In other words, in the first week of June, June 6, I believe it  
20 was, 2016, we submitted our papers on summary judgment. If one  
21 looks at the limited correspondence produced by plaintiffs last  
22 week, it reveals that on exactly one week later, they reached  
23 out with respect to these declarations. So they, after reading  
24 our papers and preparing their response, that they were  
25 relevant and material to the response. I'll leave it at that

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1 on materiality. Of course, I'll let them speak for themselves.

2 There's also no doubt that they were false. I don't  
3 think that's in serious contention, and so I'm not going to  
4 address it.

5 With respect to disclosure, there was no disclosure to  
6 either defendants or the Court at the August 2 hearing, which  
7 is indisputably after Mr. Cole testified. Mr. Cole testified  
8 that he advised plaintiffs' counsel sometime certainly before  
9 that, and plaintiffs' counsel in their papers say it's in July.  
10 But certainly before the August 2 hearing, everybody on  
11 plaintiffs' side was aware that the declarations were false.  
12 We certainly got no disclosure of that, which would have been  
13 useful.

14 And finally with respect to disclosure, while there  
15 was some limited disclosure of the correspondence between the  
16 plaintiffs' counsel and Mr. Cole in connection with the  
17 preparation of his declaration, the promised correspondence  
18 with respect to the Cole -- I'm sorry, with the Yarborough and  
19 Stone declarations never materialized. So, of course, we have  
20 no way to assess what went on there.

21 One final point, I'll be done in 30 seconds, which is  
22 that I think defendants really approached this letter writing  
23 with a great amount of restraint and lack of finger-pointing.  
24 We talk about the evidence, the materiality, and the impact.  
25 It was incredible to receive plaintiffs' response which pointed

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1 fingers at defendants for apparently not uncovering this  
2 earlier. In that regard, I'll just note that plaintiffs -- or  
3 plaintiffs' lawyers were the agents who ordered these reports.  
4 They were the agents to whom the reports were sent  
5 contemporaneously. They were the ones who supposedly sat down  
6 with these reports to craft and create the declarations which  
7 turned out to be false. So the suggestion that somehow this is  
8 a problem, a mistake, of defendants' making, it sort of boggles  
9 the mind, and I think it sort of reveals the mindset here,  
10 which is not to take responsibility for that which went wrong.

11 Just the final ten seconds, which is that, again, if  
12 one looks at the summary judgment papers, they cite repeatedly,  
13 dozens of times, to the various declarations. They don't cite  
14 at all to the reports at issue here.

15 Thank you, your Honor.

16 THE COURT: What remedy do you want?

17 MR. SCHICK: Your Honor, we believe that the  
18 appropriate remedy would be for the Court to revisit its  
19 summary judgment decision as was discussed last week. I think  
20 the supposed sales in May of 2012 were a linchpin of the  
21 argument in the case, and they're now unsupported, didn't  
22 happen. Stone can't testify to the supposed Swatch sales as  
23 well. So we think the Court ought to revisit summary judgment.

24 Short of that, if the Court were to be looking to a  
25 remedy short of that, the only thing I think that would even

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1     come close to remedying the harm would be to preclude any  
2     witnesses from the firms, either Diogenes or RJA, that were  
3     involved in these declarations.

4             THE COURT:   Mr. Paul.

5             MR. PAUL:   Thank you, your Honor.  There are a number  
6     of points I'd like to address.  I also will keep my remarks on  
7     the brief side.  First issue is materiality.  You need to  
8     understand that when the defendant filed this motion, they did  
9     not have Mr. Cole's affidavit.  It didn't exist.  The very  
10    record that had for three years, they had the reports.  They  
11    chose to move based on a lack of knowledge, which they felt was  
12    legally insufficient to trigger secondary liability.  The  
13    Court, when you reviewed the papers, I think that it's fairly  
14    clear that you acknowledge as much, that the fact that goods  
15    were purchased in May of 2012 was not challenged and that the  
16    issue was whether or not the knowledge was legally sufficient.

17            So from the vantage point of materiality, at least as  
18    I understand it -- of course, I can't put myself in the Court's  
19    shoes.  You indicated when we were last before you that you  
20    were unhappy -- but from the vantage point of materiality, as a  
21    legal matter, I submit that these statements contained in  
22    Mr. Cole's declaration, while untrue -- and we're talking about  
23    the statements that he purchased -- while untrue and while  
24    undoubtedly and understandably makes the Court unhappy and me,  
25    makes all of us unhappy that this occurred, I think as a legal

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1 matter, you need to conclude that they were not material to the  
2 decision to deny summary judgment.

3 THE COURT: They're material to the issues that you  
4 raised, though, because when you prepared your memorandum of  
5 law and opposition to motion for summary judgment, you cited  
6 the Cole affidavit, paragraphs 3, 4, 5, 6, 14, 15, 9, 12 to 15,  
7 15 and 16. I lost count. It's well in excess of a dozen.  
8 But, I mean, if you go through your brief, the pages 2, 3, 4,  
9 4, 5, 6, and 7, it's cited repeatedly. I mean, you raised the  
10 issue. You raised the issue because in your argument you were  
11 making the point that there was continuity in the 375, it  
12 continued to violate your rights, and so it's very important to  
13 have the May sale. And you believe that, and that's why you  
14 cite the -- and I certainly believed it because I cited the  
15 Cole affidavit three times in my decision. I thought it was  
16 relevant --

17 MR. PAUL: That's fine.

18 THE COURT: -- including the fact that he bought it.

19 MR. PAUL: It strikes me that you found it relevant  
20 from the vantage point of when I look at your decision at  
21 least -- again, your decision -- it appears to me that what  
22 drove the decision, what was material, was the fact of the  
23 knowledge issues and that the question of whether and, if so,  
24 who purchased the watch in May 2012 was not a factor that drove  
25 the decision. And if I may, somewhat out of turn, on the issue

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1 of disclosure that Mr. Schick raised, I want to address that.

2 THE COURT: All right.

3 MR. PAUL: Yes, we learned at some point in July,  
4 early August, but certainly before the August 2 conference with  
5 the Court, we began to put things together in talking about it  
6 with Mr. Cole. I think I explained that. We immediately --

7 THE COURT: My recollection is you told me that you're  
8 getting your witnesses ready --

9 MR. PAUL: Right, exactly so.

10 THE COURT: -- to testify.

11 MR. PAUL: Exactly.

12 THE COURT: And in that connection, you had them look  
13 through their affidavits.

14 MR. PAUL: Well --

15 THE COURT: And you learned at that time that what  
16 Mr. Cole said in his affidavit was not so.

17 MR. PAUL: We were interviewing. We were  
18 interviewing. I was interviewing Mr. Cole and asking lots of  
19 questions and things were not adding up.

20 THE COURT: Right. Of course, that's a little bit  
21 strange, you have to admit, Mr. Paul, because you prepared his  
22 affidavit; right?

23 MR. PAUL: I did. Nonetheless, on the issue of  
24 disclosure, we were concerned, and we started asking questions.  
25 And we began to put together exactly what had happened. We



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1 consulted -- I consulted, and I say my colleagues and I  
2 together, we looked at a particular opinion of the bar, city  
3 Bar Association, on the question of whether -- we considered  
4 whether we had an obligation at that point to inform the Court.  
5 The Bar Association opinion talked about the issue of  
6 materiality, and we concluded then that -- this is immediately  
7 before the August 2 conference -- that the information was not  
8 material to the Court's decision and for that reason --

9 THE COURT: Are you saying the association of the bar  
10 is adopting an attitude that says catch me if you can? You can  
11 submit anything --

12 MR. PAUL: I'm not saying that at all, your Honor.

13 THE COURT: You can submit anything you want, and it's  
14 up to the other side to find it?

15 MR. PAUL: No.

16 THE COURT: Because in all the cites you made to the  
17 Cole affidavit, you never once mentioned his underlying  
18 reports; right?

19 MR. PAUL: That's correct. We did attach the  
20 underlying reports.

21 THE COURT: I understand that.

22 MR. PAUL: And so --

23 THE COURT: And so you said it's up to us then to find  
24 that out?

25 MR. PAUL: Not at all, your Honor. We're not saying

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1 that.

2 THE COURT: But you don't disclose it.

3 MR. PAUL: Well, we did not understand -- I think it's  
4 clear from the record that we've put in front of you that I  
5 made a mistake early on in drafting the document and certainly  
6 provided Mr. Cole with ample opportunity to tell us that there  
7 was something wrong with the chronology. I think that's fairly  
8 clear from the correspondence that we've put in front of the  
9 Court. So as to the question of whether there was an  
10 intention, an intention to deceive the Court or defense  
11 counsel, the answer is no. You can see we drafted a document.  
12 It turned out that we conflated a number of different documents  
13 and identified only one person who purchased, and, in fact, it  
14 was somebody else. And we went back at least twice, each time  
15 asking the affidavit witness, Mr. Cole, to look at the document  
16 carefully, look at his reports, and the like.

17 So I think that on the question of intent, which seems  
18 to be important under the various -- if we turn to the various  
19 procedural rules on which Mr. Schick relies for the remedy he's  
20 seeking, intention is a very important element. Under  
21 Rule 11 --

22 THE COURT: How about indifference?

23 MR. PAUL: I wouldn't say that -- well, I would not  
24 characterize --

25 THE COURT: You knew, but -- this is an affidavit.

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1 You keep on suggesting that Mr. Cole drafted this affidavit. I  
2 look at the papers now, Mr. Paul, and I come to the conclusion  
3 that you drafted the affidavit.

4 MR. PAUL: Absolutely. I think that's -- we have  
5 not -- I drafted the initial draft. I think that that is clear  
6 from the papers that we put in. We also --

7 THE COURT: On the other hand, when Mr. Cole signs the  
8 affidavit that it's true and correct under penalty of perjury,  
9 he's adopting that as his own testimony, and it's submitted as  
10 sworn testimony to convince the judge about arguments that  
11 you're making. I think that that's material, and I also think  
12 that because you knew but didn't disclose, that that is  
13 significant.

14 MR. PAUL: No, your Honor, first of all, I'm -- I  
15 mean, respectfully, I disagree with you on the question of  
16 knowledge and not disclosing. If you look, there's a July 17,  
17 2017, email. I'm looking at the transmittal emails, my emails  
18 with Mr. Cole: "Please review the attached draft and let me  
19 know if it is accurate or if you would like to make any  
20 changes."

21 Looking at the next email, July 18, Paul to Cole:  
22 "Please review the attached redline carefully. If you have  
23 questions or concerns of any sort, please call me."

24 THE COURT: We also know from looking at Mr. Cole's  
25 letters that he responded, No, it seems fine to me, 28 minutes

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1 later, which suggests that he didn't read it.

2 MR. PAUL: That's not what I took, and I certainly --

3 THE COURT: It's a seven-page affidavit, and he reads  
4 it and comes back and says no problem, when the fact of the  
5 matter is you communicated with him before, were suggesting  
6 various things, like Chinatown is a known place for  
7 counterfeiting. And you look at that paragraphs 5, 6, and 7 in  
8 the affidavit, of his affidavit --

9 MR. PAUL: Absolutely.

10 THE COURT: -- you're the sole and exclusive draftsman  
11 of that because when he was asked about it, he said: I didn't  
12 draft that. I didn't know anything about it. That's his  
13 deposition testimony.

14 MR. PAUL: I have to go to his deposition testimony.  
15 I will tell you that I have had a number of discussions with  
16 him over the course of this investigation and other projects  
17 that he's worked with us on, and this is not a statement that I  
18 make up. This is something that he has expressed to us, and  
19 certainly -- and, again, I don't have the deposition testimony  
20 in front of me. So I don't think that you can -- that the  
21 Court can really conclude that this was a willful or a -- or  
22 anything other than a careless, perhaps careless, statement or  
23 putting out incorrect facts to the Court.

24 Certainly, there was no effort made to hide what we  
25 were doing, what the facts were. If there were an intention to

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1 conceal, we of course would not have attached the reports.  
2 Now, I'm not saying that we attached the reports in order to  
3 reveal something that we knew. That would be bad advocacy, and  
4 that's not something that I would do. I realize I'm not  
5 testifying under oath, but I'm telling you, as an officer of  
6 the court, it's not something that I would do and it's not how  
7 I would communicate with the Court. I've been practicing too  
8 long and too successfully to communicate with the Court in that  
9 way.

10 You look like you want to say something.

11 THE COURT: No, I don't want to say anything. I guess  
12 when you look at the affidavit the way it was drawn, you look  
13 at your argument in the brief, "third parties' use of property  
14 as a place from which to sell counterfeit Omega," and you cite  
15 the Cole affidavit, the Cole affidavit, the Cole affidavit, the  
16 Cole affidavit.

17 There's another place where you talk about ubiquitous  
18 counterfeiting problems on Canal Street. Starts out, "The area  
19 surrounding Canal Street has long been a haven for people who  
20 distribute counterfeit knockoffs." If you look at the Cole  
21 affidavit, that's exactly what he says at paragraph 4 and 5.  
22 There's no distinction between what Cole says in his affidavit  
23 and what you say in the brief, which indicates to me, as you've  
24 already admitted, that you drafted the affidavit.

25 I think that, with all due respect, Mr. Paul, you're

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1 responsible for the substantial inaccuracy that says he bought  
2 the watch, he had a conversation with the clerk. That's all  
3 portrayed as the first person. It turns out to be it's false.  
4 And then further, you knew about it, and you didn't disclose  
5 it. So I don't see how you can say anything other than you  
6 intended to do this or you're so indifferent to what it was  
7 that you didn't care to disclose it. It should have been  
8 disclosed.

9 MR. PAUL: I'll say just a few more words. I  
10 respectfully disagree with your Honor.

11 THE COURT: You can disagree with --

12 MR. PAUL: If I may -- excuse me. I'm sorry.

13 THE COURT: You can disagree with me. On the other  
14 hand, I've got to decide.

15 MR. PAUL: Of course. So let me just make two brief  
16 points before I sit down. If you are considering, the Court is  
17 considering, issuing Rule 11 sanctions, then I would ask that I  
18 be accorded the procedural protection of an order to show cause  
19 or, because certainly Mr. Schick did not write a motion  
20 specifically addressing this point, I will retain counsel and I  
21 will defend myself. In fact, I have retained counsel because I  
22 took your words very seriously, and if you're going to consider  
23 Rule 11, I would like the opportunity to put together a defense  
24 with counsel.

25 THE COURT: Mr. Schick, you want to be heard on that?